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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No.

PAUL B. ROBERTS, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF JOSEPH deR. MORENO, DECEASED
(INTERPLEADING DEFENDANT),
Petitioner,

v.

MARJORIE EILEEN BATHURST, EXECUTRIX OF THE ESTATE OF JOSEPH deR. MORENO
(ORIGINAL PLAINTIFF),
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul B. Roberts, a citizen of the Commonwealth of Massachusetts, and a resident of Winchester in said Commonwealth, as he is Administrator with the will annexed of the Estate of Joseph deR. Moreno, late of Brookline in said Commonwealth, respectfully shows unto this Honorable Court as follows:

First: The Travelers' Insurance Company, a Connecticut corporation, insured in the sum of Five Thousand Dollars, the life of Joseph deR. Moreno, a Major in the United

States Army, who died in Manila, P. I., October 16, 1936, the policy being payable to the insured's executor or administrator.

Second: In February, 1935, said Joseph deR. Moreno deserted his lawful wife, Therese M. Moreno, at Brookline, Massachusetts, and later went to live at the home of the respondent Marjorie Eileen Bathurst, at Radburn, New Jersey, remaining there until he sailed for the Philippine Islands about January 1, 1936.

Third: On April 21, 1919, Joseph deR. Moreno duly executed a will leaving all his property to his wife, Therese M. Moreno, and appointed her Executrix.

Fourth: On October 18, 1935, he executed at Boston, Massachusetts, another instrument purporting to be his last will by which he left all his property to the respondent Marjorie Eileen Bathurst, and appointed her Executrix.

Fifth: In August, 1936, said decedent obtained a pretended divorce from his lawful wife in the courts of Florida, he never having been in the State during the pendency of the suit, Florida never having been the matrimonial domicile, and no service being made on the wife in the State of Florida, the validity of which divorce has always been denied by the wife under the decision of this Honorable Court in *Haddock* v. *Haddock*, 201 U.S. 562.

Sixth: Immediately after the death of Joseph deR. Moreno, Marjorie Eileen Bathurst probated said will of October 18, 1935 in the State of Florida, in which state the decedent had a future interest in some real estate, but of which state according to your petitioner's belief and the evidence in his possession, said Joseph deR. Moreno was not a resident or citizen at the time of his death, and commenced suit against the Travelers' Insurance Company to recover the amount of said policy, which suit was removed to the United States District Court for the Northern District of Florida.

Seventh: The Travelers' Insurance Company paid the amount of said policy into said United States District Court and asked that the claimants thereto interplead.

Eighth: Believing that the will of October 18, 1935 was executed under the undue influence of Marjorie Eileen Bathurst, your petitioner offered for probate in the Probate Court of Norfolk County, Massachusetts, the will of April 21, 1919. Said Probate Court, after being informed of the execution of the will of October 18, 1935, and after notice to all parties concerned, including Marjorie Eileen Bathurst, adjudged and decreed that the residence of Joseph deR. Moreno at the time of his death was in Brookline, Norfolk County, Massachusetts, admitted the will of April 21, 1919 to probate, and, the executrix named therein having declined, appointed your petitioner administrator with the will annexed of the Estate of Joseph deR. Moreno.

Ninth: Your petitioner duly accepted said trust by giving bond as required by law and his appointment is still in full force and effect.

Tenth: Your petitioner appeared in the United States District Court for the Northern District of Florida and claimed the proceeds of said insurance policy.

Eleventh: The respondent Marjorie Eileen Bathurst moved for a summary judgment under Rule 56, Federal Rules of Civil Procedure, and, although your petitioner filed documentary evidence and affidavits showing that the domicile of the decedent at the time of his death was in Brookline, Massachusetts, including certified copies of decrees of the Probate Court of Norfolk County, Massachusetts and of the District Court of the United States for the District of Columbia, both adjudicating that fact after notice to Marjorie Eileen Bathurst, and the latter decree ordering the assets in the District of Columbia turned over to your petitioner as the domiciliary representative of the estate, said District Court for the Northern District of

Florida entered a summary judgment that said Marjorie Eileen Bathurst was entitled to the fund.

Twelfth: Your petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit, which court on the thirteenth day of June, 1940 affirmed the decree of the District Court with a slight correction, not here material, and on the twenty-fourth day of July, 1940, denied a petition for rehearing.

Thirteenth: In its opinion, the said Circuit Court of Appeals held:

"The insurance is payable to the personal representative appointed at the true domicile at death. . . . The true domicile would be difficult to decide under the evidence in this record. It could not be decided by summary judgment", but held that because the Florida Court which had admitted to probate the will of October 18, 1935, had, over the objections of Mrs. Moreno, decided in favor of the validity of that will (your petitioner not being a party to that proceeding), "Even if Massachusetts can be held the true domicile and he (your petitioner) the payee of the policy, still to avoid circuity of action this court of equity would not pay him the money to take it to Massachusetts and compel Mrs. Bathurst to follow it, subjecting her to an unnecessary burden and the money to unnecessary costs of administration."

QUESTIONS OF LAW INVOLVED.

Although the record contains extraneous matter which has little bearing on the real issues, the real questions of law involved in the decision of the Honorable Circuit Court of Appeals, as above set forth, are as follows:

1. Where an Appellate Court holds that the lower court has erroneously entered a summary judgment under Rule 56, can it proceed to decide the merits of the controversy in favor of the party obtaining such wrong

summary judgment, without either party ever having had the opportunity for a full trial of the issues involved?

2. Can a court, either trial or appellate, ignore the question of a decedent's true domicile, with all which that question involves, and "take a short cut" in favor of one who claims as a legatee money belonging to the decedent's estate?

3. Can a court, by ignoring the question of a decedent's true domicile,

(a) deprive the state of domicile of its right to administer according to its laws the personalty of the decedent?

(b) deprive the state of domicile of its right to collect inheritance taxes?

(c) deprive a widow of her statutory right under the laws of the decedent's domicile (here Massachusetts Revised Laws [Ter. Ed.] Chapter 191, Section 14), to waive any will and claim her share of the decedent's estate, as though the deceased had died intestate?

4. Can a person named executrix in the will of a decedent, by rushing into the courts of any state where a debtor can be served with process, transfer from the state of the decedent's domicile the whole or part of the administration of the decedent's estate?

5. Can a woman in Mrs. Bathurst's position, by bringing in the courts of the state which has granted a divorce, the validity of which is denied under the rules laid down by this Honorable Court, a proceeding where the divorce may be collaterally involved, deprive the courts of other states of the right given them by the decisions of this Honorable Court to refuse to give extraterritorial force to the divorce decree in question, on the ground of lack of bona fide residence?

JURISDICTION OF THIS COURT.

The decree below was rendered June 13, 1940 and is reported in 112 F. 2d 543.

A petition for rehearing was denied on July 24, 1940 and is not, so far as your petitioner knows, reported.

The jurisdiction of this court is invoked under Judicial Code, Sec. 240 (a), 28 United States Code, Section 347 (a) as amended by the Act of February 13, 1925, Chapter 229 (48 Stat. 938).

REASONS FOR THE ALLOWANCE OF THE WRIT.

Your petitioner believes that the decision of the Circuit Court of Appeals, involving as it does a question of conflict of laws and of the application of the "full faith and credit" clause of the United States Constitution, is in conflict with the applicable decisions of this Court and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power and supervision, as more fully set forth in the annexed brief, in that:

1. The decision nullifies the accepted rule that the personalty of decedent is to be administered by and in accordance with the law of his domicile, and by the executor or administrator there appointed;

2. The decision nullifies the rule that the validity of a will is to be decided by each jurisdiction for itself, and in accordance with its own laws, so far as the will applies to property within that jurisdiction, and that a will valid in one jurisdiction may not be valid in another;

3. The decision nullifies the rule expressly laid down by this Court that if the domicile of Major Moreno and his wife was in Massachusetts when he obtained the Florida divorce, and when he died, any divorce ob-

tained under the conditions here existing is void in Massachusetts under its laws and under the decisions of this Court, and said decision would oblige the lawful widow, if she wished to claim her rights in her husband's estate to litigate the validity of the divorce in the courts of the only state which would feel bound to uphold it and one to whose jurisdiction she had never submitted;

4. To allow a woman who has supplanted a lawful wife in the affections of the latter's husband to rush into the courts of any state she may for reasons advantageous to herself select and subject the administration of the husband's estate to the laws and policies of that state, regardless of the domicile of the decedent and other interested parties, and was done here, is contrary to public policy.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to send to this Court for its review and determination a transcript of the record and of all proceedings in said Court in the case entitled

PAUL B. ROBERTS, as Administrator with the will annexed of the Estate of Joseph deR. Moreno,

v.

MARJORIE EILEEN BATHURST, Executrix of the Estate of Joseph deR. Moreno,

and numbered 9289 on the docket of the said Court, and that said decree of the Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet

and in conformity with said law. And your petitioner will ever pray.

PAUL B. ROBERTS,
Administrator as aforesaid.

FREDERIC GILBERT BAUER,
Counsel for Petitioner,
50 Congress Street, Boston, Massachusetts.

AFFIDAVIT.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, October 22, 1940.

I, Paul B. Roberts, the above petitioner, make oath that I have read the foregoing petition and am acquainted with the contents thereof; and that the facts stated therein are true to the best of my knowledge and belief, my knowledge being derived from my own dealings as administrator, and from examination of the records and depositions in other litigation involving the affairs of Major and Mrs. Moreno and Mrs. Bathurst.

PAUL B. ROBERTS.

Subscribed and sworn to before me this twenty-second day of October, 1940.

MILDRED R. HAGER,
[NOTARIAL SEAL] *Notary Public.*

CERTIFICATE OF COUNSEL.

I, Frederic Gilbert Bauer, a member of the bar of this court, hereby certify I am counsel for the above-named petitioner, and that in my opinion the foregoing petition for a writ of certiorari is well founded as to matter of fact and questions of law, is entitled to the favorable consideration of this court and is not intended for delay.

FREDERIC GILBERT BAUER.

Dated October 22, 1940.

BRIEF FOR PETITIONER.

(References are to printed pages of the record, not marginal pages.)

OPINION BELOW.

Reported in 112 F. 2d 543. (See petition, p. 6.)

JURISDICTION OF THIS COURT.

Invoked under Judicial Code, Sec. 240 (a), 28 U. S. Code, Sec. 347 (a), as amended. (See petition, p. 6.)

Decision denying rehearing rendered July 24, 1940.

STATEMENT OF THE CASE.

1. Major Joseph deR. Moreno, U. S. Army, died October 16, 1936 (pp. 2, 75), leaving a $5000 life policy in the Travelers' Insurance Company of Hartford, Connecticut, payable to his executor or administrator (pp. 1–22).

2. In 1919, he made a will leaving all his property to his wife, Therese M. Moreno, and appointing her executrix (p. 73–74).

3. Prior to August, 1935, he deserted his wife, and endeavored to get her to consent to a divorce (pp. 43–44), so that he might marry Marjorie Eileen Bathurst.

4. On October 30, 1935, the Probate Court of Norfolk County, Massachusetts, entered a decree of separation between the parties (pp. 22, 68).

5. On October 18, 1935, he made a will, in which he describes himself as of Boston, Mass., leaving all his property to Marjorie Eileen Bathurst, and appointing her executrix (pp. 63–64).

6. On August 6, 1936, a court in Florida entered a divorce decree in favor of Major Moreno, based on a pretended resi-

dence in Florida, on constructive service only, and without Mrs. Moreno appearing in the case (pp. 60, 70–71).

7. Major Moreno had previously been warned that the validity of any divorce he might obtain in Florida would be contested, and there is evidence that he admitted that he had lost his residence there (pp. 43–46).

8. After his death, Mrs. Bathurst probated the will of October 18, 1935, in Florida and brought suit in the state court of Florida on a life insurance policy in the Travelers' Insurance Company, a Connecticut corporation, payable to Major Moreno's executor or administrator (pp. 60, 1–2), the action being removed to the United States District Court for the Northern District of Florida (p. 23).

9. On evidence that Major Moreno had lost his residence in Florida by acquiring one in Washington, D. C., Mrs. Moreno was appointed Collector of the estate in the District of Columbia, and as such appeared in the Florida action to claim the fund (pp. 22, 65).

10. She also appeared to contest the probate of the will of October 18, 1935 (p. 65).

11. She also filed in the Florida court a claim to dower in such property as there was in Florida (pp. 68–69).

12. It later appeared that Major Moreno had acquired a domicile in Massachusetts (pp. 39, 40–43), and after due notice to Mrs. Bathurst and a full disclosure of the facts, the Probate Court of Norfolk County, Massachusetts, allowed the will of 1919, as Major Moreno's last will and appointed your petitioner administrator with the will annexed (pp. 74–82) and the District of Columbia court, also after due notice to Mrs. Bathurst, ordered the District of Columbia assets turned over to your petitioner as the representative of the estate in the jurisdiction of domicile (pp. 39–40).

13. The Florida court, in a proceeding to which your petitioner was not a party, upheld the validity of the will of October 18, 1935 (pp. 87–88).

14. The Florida Probate Act of 1933, Sec. 36, provides:

> "To entitle a widow to dower, she must so elect by an instrument in writing signed by her . . . and filed in the office of the County Judge . . . within nine months after the first publication of notice to creditors. The County judge shall record all elections to take dower."

The will of October 18, 1935 was allowed in Florida November 21, 1936 (p. 60). The claim of dower was filed October 12, 1937 (pp. 60, 69). It may properly be inferred from these dates—and it is the fact—that the claim of dower was filed after the nine months period had expired, as presumably the notice to creditors was given promptly after probate of the will. At all events, Mrs. Moreno withdrew the claim before the time set for hearing on it (pp. 61, 88). The court refused to allowed her to withdraw, but it is apparent from the record (pp. 88–90) that she offered no evidence and that the question of the validity of the divorce was not brought up or passed on.

15. Your petitioner, as administrator with the will annexed, appointed in the domicile of Major Moreno, appeared in the United States District Court to claim the proceeds of the policy, he not being a party to any litigation in the state court of Florida.

16. The United States District Court, on motion of Mrs. Bathurst, entered a summary judgment in her favor (pp. 46–47), in spite of evidence filed by your petitioner (pp. 37–46) showing that Major Moreno had lost his domicile in Florida by acquiring one in the District of Columbia, and later had acquired one in Massachusetts, from which judgment your petitioner duly appealed.

17. The Circuit Court of Appeals, although holding that "the insurance is payable to the personal representative appointed at the true domicile at death", and that "the true domicile would be difficult to decide under the evidence in

this record. It could not be decided by summary judgment", affirmed the judgment it had held wrongly entered, on the ground of avoiding circuity of action and unnecessary expense on Mrs. Bathurst (see opinion), and denied a petition for rehearing, although the fact that substantial rights were being cut off by its decision was duly called to its attention in said petition (q. v.).

SPECIFICATION OF ERRORS.

Your petitioner contends that the Circuit Court of Appeals erred in not remanding the case for a trial on the merits on the question of domicile, because its decision is at variance with the law and the decisions of this Honorable Court in each of the matters of law set forth on pages 6–7 of the foregoing petition, under "Reasons for the Allowance of the Writ."

SUMMARY OF ARGUMENT.

The administrator in the deceased's domicile is entitled to the personal property, regardless of its location (I).

If Massachusetts was the true domicile, the probate preceedings in Florida are not binding on it (II and III).

The insurance money here involved was not in any way subject to the laws of Florida (IV).

Even if the will allowed in Florida is valid in Massachusetts, still the State of Massachusetts and all parties in interest have rights under Massachusetts law which require that the estate be administered through the Massachusetts courts (V).

The decree of the Circuit Court of Appeals in effect affirms a judgment which it holds was wrongly entered, without giving the adverse party a "day in court" (VI).

To allow a woman claiming under the will of a man whose affections she has won from his wife to force the administration of his estate in any jurisdiction which she may select for reasons advantageous to her is contrary to public policy (VII).

ARGUMENT.

I.

THE EXECUTOR OR ADMINISTRATOR APPOINTED IN THE JURISDICTION OF DOMICILE IS ENTITLED TO ALL PERSONAL PROPERTY REGARDLESS OF ITS LOCATION.

Wyman v. *Halstead,* 109 U.S. 654.
Wilkins v. *Ellett,* 9 Wall. 740.

The Circuit Court of Appeals admits this in its opinion (112 F. 2d, bottom of second column on p. 544) and cites its own decision in *Vogel* v. *N. Y. Life Ins. Co.,* 55 F. 2d, 205.

II.

THE ADMISSION OF THE WILL OF OCTOBER 18, 1935, TO PROBATE IN FLORIDA DECIDES NOTHING MORE THAN THAT THAT WILL WAS VALID UNDER THE LAWS OF FLORIDA AS REGARDS PROPERTY WITHIN FLORIDA, AND IF MASSACHUSETTS WAS THE DOMICILE, IT IS NOT BINDING ON THE COURTS OF MASSACHUSETTS.

Burbank v. *Ernst,* 232 U.S. 162.
Blount v. *Walker,* 134 U.S. 607.

III.

THE RECORD DOES NOT SHOW THAT THE PROBATE COURT IN FLORIDA PASSED ON THE QUESTION OF DOMICILE, AND EVEN IF IT DID, IF FLORIDA WAS NOT IN FACT THE DOMICILE, THE DECISION IS NOT BINDING ON THE COURTS OF MASSACHUSETTS.

The only portions of the proceedings in the Florida probate court regarding this will which are included in the record (pp. 58, 64–68), do not show that that court passed on anything more than the validity of the will.

Jurisdiction of the Florida court did not depend on domicile as is shown by the following excerpt from the Florida probate law of 1933, Section 43:

"The venue of all wills and granting of letters of administration shall be:

(a) In the county in this State where the decedent had his domicile.

(b) If the decedent has no domicile in this State, then in any county in which the decedent was possessed of any property.

(c) If the decedent had no domicile in this State, and was possessed of no property in this State, then in any county where any debtor of the decedent may reside . . ."

Different states and courts take different views on the question of testamentary capacity and undue influence, and what might be held a valid will in one court and state would not necessarily be so held in others.

The case of *Burbank* v. *Ernst,* 232 U.S. 162, is on all fours with the present case. There a will was allowed in Texas on the ground of domicile there, but a Louisiana court held Louisiana to be the true domicile, disallowed the Texas will, and allowed an earlier one, exactly as was done in the Moreno case, and this court upheld its action.

Blount v. *Walker,* 134 U.S. 607.

IV.

THE INSURANCE MONEY WAS NOT ASSETS IN FLORIDA NOR DID IT PASS UNDER THE LAWS OF FLORIDA.

The Travelers' Insurance Company is a Connecticut corporation (pp. 21–22) with its home office in Hartford (p. 3).

The money was not in the custody of the probate court administering the estate in Florida, but was in the hands of the insurance company until it was paid into the United States District Court on an interpleader (p. 23, par. H).

If Florida was not Major Moreno's domicile it did not pass "by will or by the intestate laws" of Florida. The

very will probated in Florida describes the testator as of Boston, Mass. (pp. 63, 64), and the fact that one of the witnesses was Ellwood W. Sargent, who on page 90 describes himself as of Milton, Mass., indicates (and outside evidence shows it to be the fact) that the will was executed in or near Boston.

Eidman v. *Martinez*, 184 U.S. 578.
Wyman v. *Halstead*, 109 U.S. 654.

V.

IF MASSACHUSETTS WAS THE DOMICILE FROM 1933 TILL MAJOR MORENO'S DEATH, MRS. MORENO IS ENTITLED TO HAVE HER RIGHTS AS WIDOW DETERMINED UNDER THE LAWS OF MASSACHUSETTS.

The only portion of the Florida divorce proceedings in the record is the decree (pp. 70–71). This does not show a bona fide residence in Florida, personal service on the libellee within the state, or a cause for divorce which would be recognized in Massachusetts.

Massachusetts General Laws (Ter. Ed.) Chap. 208, Sec. 39, expressly provides:

> ". . . if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth,"

and this court has held in *Haddock* v. *Haddock*, 201 U.S. 562, that bona fide residence is necessary for a divorce to be entitled to extra territorial recognition, and in *Andrews* v. *Andrews*, 188 U.S. 14, that a wife against whom a void divorce has been obtained can claim her rights as the lawful widow.

The evidence as to the divorce was introduced by Mrs.

Bathurst (pp. 52, 60, 70–71), and if it was of any materiality in the present action, it was for her to set forth the necessary jurisdictional facts to show that it was valid, and that Florida, not Massachusetts, was the true domicile. The record is barren of any evidence that Major or Mrs. Moreno was ever in Florida after he took up his residence in Washington, D. C., in 1911 (pp. 40, 42) (which domicile it is claimed he lost by acquiring one in Massachusetts in 1932 or 1933) except for one short visit in 1919 (p. 42).

Massachusetts General Laws (Ter. Ed.) Chapter 191, Section 15, so far as material, is as follows:

> "The surviving husband or wife of a deceased person . . . within six months after the probate of the will of such deceased, may file in the registry of probate a writing signed by him or by her, waiving any provisions that may have been made in it for him or for her, or claiming such portion of the estate of the deceased as he or she would have taken if the deceased had died intestate, and he or she shall thereupon take the same portion of the property of the deceased, real and personal, that he or she would have taken if the deceased had died intestate . . ."

Massachusetts General Laws (Ter. Ed.) Chapter 190, Section 1, provides as follows:

> "A surviving husband or wife shall . . . be entitled to the following share in his real and personal property not disposed of by will:
>
> (1) If the deceased leaves kindred and no issue, and it appears on determination by the probate court, as hereinafter provided, that the whole estate does not exceed five thousand dollars in value, the surviving husband or wife shall take the whole thereof; otherwise, such survivor shall take five thousand dollars and one

half of the remaining personal and one half of the remaining real property."

So far as the record discloses—and it is the fact—Major Moreno left kindred (a mother) and no issue (p. 79). If the present fund is the entire estate, Mrs. Moreno under the law of Massachusetts would take it all; otherwise she would take this entire fund and half the balance of the estate, *whether or not the Florida will is allowed in Massachusetts,* and whether or not the Florida adjudication as to the will is binding on the Massachusetts court.

VI.

THE CIRCUIT COURT, AFTER HOLDING THAT THE LOWER COURT ERRED IN ENTERING A SUMMARY JUDGMENT, PROCEEDS TO GIVE EFFECT TO THAT JUDGMENT, WITHOUT GIVING THE ADVERSE PARTY ANY TRIAL ON THE MERITS.

Obviously, the question of Major Moreno's domicile is vital to this case. It is not a case of "avoiding circuity of action" or of "subjecting" Mrs. Bathurst "to unnecessary burden" as the court says in its opinion. If the domicile was in Massachusetts, Mrs. Moreno has substantial rights, to be decided by the courts and under the laws of Massachusetts. The State of Massachusetts also has a right to collect inheritance taxes. These rights the Circuit Court of Appeals lightly tosses aside. It is as if that court had held a verdict wrongly directed for a party on a trial, and then entered judgment for the same party, without a jury ever having a chance to pass on the merits of the case. The present situation is even stronger, because on a motion for a directed verdict the case would presumably have been fully tried, whereas Rule 56 does not require that a party on a motion for summary judgment shall show he is entitled to prevail, but only that there is a "genuine issue as to any material fact", and that the moving party is not "entitled

to judgment as a matter of law." The Circuit Court of Appeals in its opinion admits that your petitioner has shown a genuine issue, yet it gives effect to the action of the District Court which it holds was wrong.

VII.

IT IS AGAINST PUBLIC POLICY TO ALLOW A WOMAN IN MRS. BATHURST'S POSITION VIRTUALLY TO TRANSFER THE ADMINISTRATION OF AN ESTATE TO ANY JURISDICTION WHERE SHE FEELS SHE MAY HAVE AN ADVANTAGE, BY THE MERE PROCESS OF GETTING SERVICE IN THAT JURISDICTION ON A DEBTOR OF THE ESTATE.

It is evident from the record that Mrs. Bathurst had won the affections of Major Moreno from his lawful wife; that he wished his wife to get a divorce so that he could marry Mrs. Bathurst; that she refused, and by her counsel said that she would contest the validity of any divorce he might obtain in either Reno, Nevada, or Florida (pp. 43–46); that after a Massachusetts court had decreed a separation (p. 22, par. D), Major Moreno, having previously made a will in favor of Mrs. Bathurst (pp. 63–64), in December, 1935, desired to make his insurance payable to her (pp. 22–23)—why he did not disclose the "relationship" between himself and Mrs. Bathurst and never carried out his intention is food for thought; perhaps he had changed his mind regarding her,—and that in August, 1936 he procured a divorce in Florida upon constructive service and without his wife subjecting herself to the jurisdiction of the Florida court (pp. 60, 70–71).

Under the decisions of this court, a divorce so obtained in the absence of bona fide residence is binding in the courts of the state granting it, but no other state is bound to recognize it.

Blackinton v. *Blackinton*, 141 Mass. 432, quoted by

this court with approval in *Haddock* v. *Haddock,* 201 U.S. 562, 578–9.
Maynard v. *Hill,* 125 U.S. 190.

If Major Moreno had lost his Florida domicile (and there is evidence that he admitted he had lost it) (pp. 43–46), his claim of domicile in Florida for the purpose of divorce was clearly colorable. Indeed, Mrs. Bathurst offered no evidence that he had re-acquired a Florida domicile, but relied on his having kept the domicile of origin in Florida.

The laws of different states differ widely in the matter of a wife's rights if she waives her husband's will. Very likely in some states she has no rights. If, therefore, a person who claims under a will adverse to the wife can by the mere process of bringing suit in any state, where service of process on a debtor can be had, subject part of the personal property to the probate laws of that state, she can so subject the whole of the personal property, and thus deprive the domiciliary state of all power over the estates of its own citizens, and the widow and next of kin of their rights under the laws of the domiciliary state.

This situation becomes worse where, as here, the rights of the widow depend on the validity of a divorce which the courts of the forum so selected must recognize, but which the domiciliary state refuses to recognize on grounds of public policy, as this court held Massachusetts was entitled to do in *Andrews* v. *Andrews,* 188 U.S. 14, 32–34.

If the decision of the Circuit Court of Appeals is upheld, it affords an easy way for persons to nullify the rules laid down by this court regarding administration in *Burbank* v. *Ernst,* 232 U.S. 162, and the effect of divorce not based on residence, in *Haddock* v. *Haddock,* 201 U.S. 562.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 522

PAUL B. ROBERTS, Administrator with the will annexed of the Estate of Joseph deR. Moreno, deceased,
Petitioner,

v.

MARJORIE EILEEN BATHURST, Executrix of the Estate of Joseph deR. Moreno, deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELTON PITNEY,
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JOHN M. COE,
Of Counsel for Respondent.

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BRIEF FOR MARJORIE EILEEN BATHURST, AS EXECUTRIX, ETC., IN OPPOSITION

OPINION AND JUDGMENT BELOW

The opinion of the Circuit Court of Appeals (112 F. 2d 543) will be found at page 99 of the Record. The District Court filed no opinion.

The judgment sought to be reviewed was entered on June 13, 1940 and will be found at page 103 of the Record. A petition for re-hearing was filed on July 1, 1940 (R. 104) and was denied on July 24, 1940 (R. 108). The petition for certiorari was filed on October 24, 1940.

The decree of the United States District Court for the Northern District of Florida (referred to herein as "the District Court"), will be found at pages 46 to 47 of the Record.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A., Section 347 (a)).

QUESTIONS INVOLVED

1. When a United States District Court, having jurisdiction of an interpleader suit and of both claimants to the deposited proceeds of a life insurance policy payable to the insured's personal representative, has awarded the fund to the executrix and sole beneficiary of a will probated in a state court within the District and has dismissed her adversary's claim (1) that the will is invalid and (2) that such adversary is entitled to the fund (a) as sole next of kin entitled to take because of the alleged intestacy and (b) as collector of the estate appointed in a foreign jurisdiction asserted to be the domiciliary jurisdiction,—and such award was made to await and follow a decree of said probate court rendered in a litigation between the same parties in which the same claim was presented and similarly decided,—is a third party subsequently entering the interpleader to claim the fund as foreign administrator with an earlier will annexed, by appointment in a second foreign jurisdiction, of which earlier will the defeated claimant was named as sole beneficiary and executrix, en-

titled to a trial by the District Court of his contention that insured's domicile at death was in such second foreign jurisdiction?

2. In any event, is such foreign administrator c. t. a. entitled to such trial under such circumstances when he has been appointed at the instance of such unsuccessful claimant and by virtue of her renunciation in his favor of her executorship under the earlier will and he has awaited the unfavorable outcome of the local probate court litigation and of the interpleader suit before appearing and asserting his claim in the latter?

STATEMENT

Major Joseph deR. Moreno, Medical Corps, United States Army, died on October 16, 1936. He carried an insurance policy issued on November 21, 1935 by Travelers Insurance Company, insuring his life for $5,000 in favor of his executor or administrator (R. 22). The right to the proceeds of that policy, as between the executrix of the Major's will, admitted to probate in Florida, and the wife from whom he had obtained a decree of divorce in Florida, the domicile of his origin and at his entry into the Army (R. 70-71, 35, 82-86), is the issue involved in the case at bar. That issue has twice been resolved in favor of the executrix (respondent here), and against the divorced wife, first, by the Florida probate court (R. 58), and, later, by the decree of the District Court in the interpleader suit at bar (R. 58-59).

Later the present petitioner, Roberts, entered the suit at bar and sought to re-litigate the issue thus twice determined

against Mrs. Moreno. The courts below denied his right to do so.

About a year before his death and prior to the entry of his divorce decree, and on October 18, 1935, Major Moreno executed his will (R. 63), in which he recited that he had provided for his wife, Therese Moreno, by a declaration of trust of even date and, for that reason, "made no provision for her in this my will", and by which he devised and bequeathed his estate to respondent, Marjorie Eileen Bathurst, whom he also named as executrix. The will was admitted to probate in the County Judge's Court of Escambia County, Florida (elsewhere referred to in this brief as "the probate court"), and respondent qualified as executrix thereof on November 21, 1936 (R. 60).

On February 1, 1937 respondent, as such executrix, filed her declaration in the case at bar in the Circuit Court of Escambia County, against Travelers Insurance Company, to recover the proceeds of the policy (R. 1). The case was removed to the District Court and on April 9, 1937 the Insurance Company (pursuant to 28 U. S. C. A., Section 41, Subdivision 26(e), as amended by the Act of June 20, 1936, c. 13, sec. 1, 49 Stat. 1096), filed its answer and equitable plea, paid the proceeds of the policy into the registry of the District Court and interpleaded Therese Marie Moreno, individually and as Collector of the estate (under *ex parte* appointment as such Collector in the District of Columbia on November 25, 1936, R. 21-25 and 32).

On July 12, 1937 Mrs. Moreno appeared and answered the equitable plea (R. 53-54), alleging that the Major's will was invalid because of mental incompetency and undue in-

fluence and that she was entitled to the proceeds of the insurance policy as the domiciliary personal representative. She also alleged invalidity of the Major's decree of divorce and asserted a right to the proceeds of the policy as the Major's widow and sole "heir at law" (R. 54).

On July 20, 1937 respondent moved to dismiss Mrs. Moreno's claim (R. 55), but the District Court, by order made on August 20, 1937, recited that the Florida will was under attack by Mrs. Moreno in the probate court and stayed all proceedings in the instant suit "until the validity of said will shall have been determined by said County Judge's Court and until the further order of this Court" (R. 56).

Proceedings in the probate court which led to the last-mentioned stay of the proceedings below.

On July 16, 1937 Mrs. Moreno, individually and as Collector, filed a petition in the probate court to revoke the probate of the Major's will, in which petition (R. 32) she raised the same issues as those raised by her answer and claim filed four days earlier in the case at bar. On July 20, 1937 respondent answered and joined issue on the petition to revoke (R. 32).

By its judgment entered on March 7, 1939 the probate court denied and dismissed the petition to revoke probate (R. 87). *No appeal was taken from that decree.*

On October 12, 1937 Mrs. Moreno also filed in the probate court an election to take dower and, on November 1, 1937, a petition for an assignment of dower (R. 33), Respondent again joined issue (R. 33). Under Section 7065, Compiled General Laws of Florida (see appendix) if Mrs. Moreno were really the widow and could successfully

attack the will, she would take all; under other appropriate statutes she could claim dower, even if the will were valid. After the taking of depositions and the introduction of evidence and after the expiration of the time limited by the probate court for the completion of Mrs. Moreno's testimony, she attempted to withdraw her claim to dower without prejudice, but the probate court by judgment dated May 16, 1939 denied the application, recited that it had considered the election to take dower and the application for an assignment thereof and that respondent had "entitled herself to a disposition of said cause upon the merits", and decreed that Mrs. Moreno take nothing by her election to take dower (R. 88-90). *No appeal was taken from that decree.*

Following the denial of the petition to revoke probate the District Court, by judgment dated April 5, 1939, vacated the stay and decreed dismissal of Mrs. Moreno's claim to the insurance money, both in her individual capacity and in her capacity as Collector (R. 58-59). Respondent's motion for said judgment was based upon the judgment of the probate court determining the validity of the Major's will (R. 57-58). *Mrs. Moreno did not appeal from the judgment of the District Court dismissing her claim.*

Entry of present petitioner into the litigation

After the District Court's dismissal of Mrs. Moreno's claim, and on May 11, 1939, the present petitioner entered the suit and filed an answer and claim (R. 25-28) in which he sought to revive the very questions already disposed of by the probate court and the District Court, alleging, how-

ever, that the Major was domiciled in Massachusetts at the time of his death, that claimant (Roberts) had been appointed administrator c. t. a. in that State (under a will purportedly executed on April 21, 1919, R. 73-74 and filed for probate on October 28, 1937) and that he was entitled to administer the proceeds of the policy.

Respondent moved for a summary judgment under Rule 56,* upon the record and the affidavit and exhibits annexed to the notice of motion (R. 29-37). The petitioner filed counter-affidavits (R. 37-46) and on June 6, 1939 the District Court adjudged the petitioner's claim invalid and respondent's claim valid, and ordered the insurance money paid to respondent (R. 46-47).

Mrs. Moreno was the only beneficiary of and the executrix named in the 1919 will (R. 73-74). She filed a declination to act as such executrix on October 28, 1937 (R. 64, 91) and applied for the appointment of the petitioner, Roberts, as administrator c. t. a. (R. 74). While consistently asserting in the various Florida proceedings that Major Moreno's domicile at death was in the District of Columbia and that she was entitled to the insurance money as domiciliary representative there appointed, she simultaneously procured from the Massachusetts probate court an *ex parte* decree that the Major was domiciled in Brookline, Massachusetts, at the time of his death (R. 35, 78). That decree was not brought to the attention of the Florida probate court of the District Court until the present petitioner intervened following Mrs. Moreno's defeat.

***Rules of Civil Procedure for the District Courts of the United States.**

ARGUMENT

As appears from the statement in this brief of the questions involved, respondent disagrees that the "questions of law involved", as stated at pages 4 to 5 of the petition for certiorari, are, in fact, involved. Respondent submits that petitioner's questions are supposititious and his argument largely academic.

Point I of petitioner's argument presupposes that Massachusetts was Major Moreno's domicile at death, while his specification of error is that the District Court should have tried the case "on the merits on the question of domicile" (petitioner's brief, p. 12).

The courts below were not confronted with the question of the effect of the Florida probate "on the courts of Massachusetts", to which Point II and III of petitioner's brief are addressed. Moreover, the courts below did not rely upon the probate, *per se,* of the Major's will, but upon a decree of a court of admitted jurisdiction over the subject matter and the litigants, adjudging the validity of the will in a contest between the only two parties beneficially interested in the outcome and in the insurance money.

It is respectfully submitted that the petition and supporting argument disregard or show a failure to understand the true basis of the decision of the Circuit Court of Appeals. The rationale thereof appears from the following quotations from the court's opinion:

> "But the judgment of the Florida probate court rendered during the pendency of the interpleader case settles who is the beneficial owner of this money, and a court of equity having it in its hands need not enter on a litigation to determine domicile

so as to pay it to the correct trustee, if it has the beneficial claimants before it and knows which of them ought to get it. There are no debts to be paid. Under one will Mrs. Moreno is entitled to the money; under the later will Mrs. Bathurst is entitled. Mrs. Moreno and Mrs. Bathurst have confronted one another in the Florida probate court on the issues whether that court had jurisdiction as the court of domicile, and whether the later will was the true last will.

* * * * * * * *

Roberts asserts that he is not party to and is not bound by the Florida court's decision, and that Mrs. Bathurst is bound as to him by the probate of the other will in Massachusetts. The Massachusetts probate, as an *in rem* proceeding, would protect Roberts in his administration in Massachusetts of any assets there. But it was made only on constructive service. We do not think it is available in Florida to override the adjudication made there on an actual contest between the interested parties. Roberts himself has no substantial rights. He was appointed administrator on the consent of Mrs. Moreno, and appears to have stood by awaiting the result of her contest with Mrs. Bathurst in the Florida probate court. Immediately after her defeat he entered the interpleader case. Even if Massachusetts can be held the true domicile and he the payee of the policy, still to avoid circuity of action this court of equity would not pay him the money to take to Massachusetts and compel Mrs. Bathurst to follow it, subjecting her to an unnecessary burden and her money to unnecessary costs of administration."

We have found no other decision in point and petitioner has cited none. The decision below seems eminently cor-

rect. While a decision of a non-domiciliary court is not binding upon other states, it does bind the interests of all persons who appear and litigate therein, wherever the personal property which they claim is situate. Section 470 (3) Restatement of the Law, Conflict of Laws, reads:

> "A judgment in administration proceedings in *any* state is conclusive upon all persons who became subject to the jurisdiction of the court in such proceedings."

Hence, the decision of the Florida probate court binds Mrs. Moreno, whether she acts in person or through the studied intervention of another.

The argument suggested by the third question of law stated by petitioner to be involved (Petition, p. 5) overlooks first, that it is not the petitioner's province to advance the theoretical rights of the State of Massachusetts and, second, that petitioner now suggests those rights for the first time.

All argument addressed to Mrs. Moreno's rights as supposed "widow" (see particularly Points V and VI of petitioner's argument) overlooks the fact that Mrs. Moreno's status as widow was adjudicated adversely to her upon her application for dower in Florida. She there unsuccessfully attacked the divorce and petitioner cannot now be heard to attack it collaterally, if, indeed, he could ever be privileged to do so. We are not here concerned what the result would be if a Masachusetts court should refuse to give full faith and credit to or recognize by comity the various decrees in Florida admittedly binding on Mrs. Moreno and from which she did not appeal.

Adverting briefly to the suggestion that the decree of the Massachusetts probate court is binding on respondent,

because of constructive service upon her (R. 76), it should be mentioned that while the notice mailed to Mrs. Bathurst advised her that a certain instrument purporting to be Major Moreno's last will and testament would be offered for probate and that, in order to object, respondent must file written appearance in the Massachusetts court on or before November 24, 1937 (R. 76-77), no notice was given that the court would entertain or attempt to pass on the question of Major Moreno's domicile. We do not think it can be seriously argued that the Massachusetts decree purporting to adjudicate Major Moreno's domicile at death is binding on respondent anywhere, even in Massachusetts.

Petitioner's remaining points seem not to require answer. Point VII again presupposes Mrs. Moreno's status as a widow and would be more appropriate as a jury address in an alienation suit.

CONCLUSION

Petitioner litigates no interest of his own, only that of Mrs. Moreno. She is estopped by the judgment of the Florida probate court to assert the invalidity of the will under which respondent takes. She is also estopped by the judgment of the District Court of the United States for the Northern District of Florida to claim the specific fund here in question. In both courts she has personally appeared and has put in issue the domicile of the decedent. She has also unsuccessfully attacked the validity of the Florida divorce on the ground that the Major was not domiciled there at the time. From none of the adverse decrees has she appealed.

As Mrs. Moreno is clearly estopped and the petitioner asserts only her rights, it is submitted that petitioner is also estopped, and such clearly appearing by record evidence summary judgment was properly based thereon.

The petition should be denied.

Respectfully submitted:

SHELTON PITNEY,
Counsel for Respondent.

JOHN M. COE,
Of Counsel for Respondent.

APPENDIX

Section 7065, Compiled General Laws of Florida.

7065. DISPOSITION OF PROCEEDS:—Whenever any person shall die in this state leaving insurance on his life, the said insurance shall inure exclusively to the benefit of the child or children and husband or wife of such person in equal portions, or to any person or persons for whose use and benefit such insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment or any legal process in favor of any creditor or creditors of the person whose life is so insured, unless the insurance policy declares that the policy was effected for the benefit of such creditor or creditors; Provided, however, that whenever the insurance is for the benefit of the estate of the insured or is payable to the estate or to the insured, his or her executors, administrators or assigns, the proceeds of the insurance may be bequeathed by the insured to any person or persons whatsoever or for any uses in like manner as he or she may bequeath or devise any other property or effects of which he or she may be possessed, and which shall be subject to disposition by last will and testament.